CHARITY VERSUS SOCIAL INSURANCE IN UNEMPLOYMENT COMPENSATION LAWS†

A number of current proposals for changes in state unemployment compensation laws, some of which have been enacted by a few states,[1] prescribe special conditions which otherwise eligible claimants must meet before receiving unemployment compensations. By far the most important of these proposals, already enacted in two states and the District of Columbia, would compel a claimant to attend publicly financed vocational retraining[2] courses recommended by a designated official.[3] There have also been proposals that poorly educated claimants be required to attend basic education courses,[4] and that claimants be required to perform public work without remuneration.[5]

---

†A number of the footnotes are based upon conversations the author was privileged to have with members of the staff of the Solicitor's Office, U.S. Department of Labor and with Mr. Joseph J. Gibbons, Executive Director, Employment Security Division, Connecticut Labor Department. Any views expressed herein are, of course, attributable only to the author.

1. In this Note "state" will include the District of Columbia. This is consistent with usage in the federal statutes with which this Note will deal. See Federal Unemployment Tax Act, INT. REV. CODE OF 1954, § 3306(j) and Social Security Act § 1101(a)1, as amended, 49 Stat. 647 (1935), 42 U.S.C. § 1301(a)1 (1958). These acts will be cited hereinafter as follows: Federal Unemployment Tax Act (current version): FUTA, INT. REV. CODE OF 1954; section numbers given will be those in the Code. Social Security Act (current version): SSA, 42 U.S.C.; section numbers given will be those in U.S.C. The original (1935) version of the Social Security Act, which included both of the above acts: Social Security Act, 49 Stat. 620; section numbers given will be those of the act as passed. In the text these acts will be referred to as the Social Security Act.

2. By "vocational training," as used throughout this Note, is meant education designed to improve the trainee's immediate employment prospects; by contrast, "basic education" is used to mean education not specifically directed to that end. Thus, basic arithmetic would be "vocational" if taught to enable persons to become waiters.

3. See MICH. STAT. ANN. ch. 154(b), § 17530(e) (1960); VERNON'S ANN. MO. STAT. § 288.055(2) (Supp. 1962); D.C. CODE tit. 46, § 46-310(e) (1961). For the texts of these provisions, see notes 94 and 105 *infra*.

The requirement has been proposed in other states. See, *e.g.*, House Joint Resolution 203, Connecticut General Assembly of 1959, 1959 CONN. H.R. JOUR., pt. 2, at 1709, authorizing a study of the requirement by the Connecticut Legislative Council. The study resulted in a negative recommendation. NINTH BIENNIAL REPORT OF THE [CONNECTICUT] LEGISLATIVE COUNCIL, Dec. 5, 1960.

In at least one state—Ohio—the requirement would apparently be considered within the scope of administrative discretion. Letter from Beman S. Pound, Director, Unemployment Compensation Division, Ohio Bureau of Unemployment Compensation to the *Yale Law Journal*, April 24, 1963, on file in Yale Law Library. [All letters hereinafter cited are to the *Yale Law Journal* and are on file in the Yale Law Library.] The letter states: "We would, as a matter of policy, disqualify an individual for refusing to attend a training course if we believed that attendance was his best course of action to relieve his unemployment."

4. So far, these proposals have been merely informal.

5. So far, these proposals have been merely informal. But some state laws come close to such a requirement. See ORE. REV. STAT. §§ 411.860 and 657.155 (1961).

Ohio requires a claimant to execute a loyalty oath.[6] Proposals of this nature[7] appear to conflict with the fundamental community values in which the unemployment compensation program has its roots. The importance of this conflict arises from the relationship of state unemployment compensation laws to the federal compensation program. The tax and fiscal benefits which flow from state participation in the federal program are conditioned upon conformity by state laws and administration with certain federal standards. To the extent that these standards embody the fundamental community values underlying the program, states whose laws contravene those values face the loss of the substantial benefits of participation.[8]

When the Social Security Act[9] was passed by overwhelming majorities of both houses of Congress[10] in 1935, there was uniform agreement that its unemployment compensation provisions[11] represented a radical departure from traditional methods of dealing with economic insecurity. The social insurance principle which the act embodied was new to the American public and to American law.[12] Traditional community response to the needs of the unem-

6. OHIO REV. CODE §§ 4141.28, 4141.29(C)4 (1954). For text, see note 87 *infra*.

7. There have undoubtedly been other similar proposals; those set forth herein suffice to indicate the type of condition to be considered.

8. It was estimated that for the fiscal year ending June 30, 1963, California's participation in the program entitled the state to $47,000,000 in grants from the federal government for reimbursement of the state's administrative expenses, and entitled the state's employers to $320,544,000 credit against the federal tax on employers. See Appellant's Supplemental Brief, pp. 2-3 and appendix "B," Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 27 Cal. Rptr. 878 (1963) [hereinafter cited as Supplemental Brief]. See notes 46-56 *infra* and accompanying text.

9. Social Security Act, 49 Stat. 620. The act was an omnibus, including old age and survivors' insurance, aid to needy children, aid to the blind, etc.

10. It passed the House 371 to 33, and the Senate 76 to 6. Witte, *An Historical Account of Unemployment Insurance*, 3 LAW & CONTEMP. PROB. 157, 167-68 (1936) [hereinafter cited as Witte, *Historical Account*].

11. Social Security Act, 49 Stat. 620, tit. III and IX. These titles are now SSA, 42 U.S.C. §§ 301-03, 901-05 and FUTA, INT. REV. CODE OF 1954, §§ 3301-09.

12. Most European countries had had extensive experience with unemployment compensation and other social insurance programs. See SOCIAL SECURITY BOARD, PUB. No. 20, SOCIAL SECURITY IN AMERICA 4-7, 181-82 (1937). Wisconsin was the only state to adopt an unemployment compensation law before it was clear that a federal program would be enacted. See Steward Machine Co. v. Davis, 301 U.S. 548, 587-88 (1937). The Wagner-Lewis unemployment compensation bill of 1934, H.R. 7659, 73d Cong., 2d Sess. (1934), failed of passage when President Roosevelt indicated he would appoint a committee to study the problem and to recommend legislation. This Committee on Economic Security, whose Chairman was Secretary of Labor Frances Perkins and whose Executive Director was Edwin E. Witte (several of whose works are relied upon heavily in this Note), recommended a comprehensive social security measure which, in its unemployment compensation features, was enacted almost unchanged as the Social Security Act. For the historical background of the act, see WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962) [hereinafter cited as WITTE, DEVELOPMENT]; Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21 (1945) [hereinafter cited as Witte, *Development of Unemployment Compensation*]; Witte, *Historical Account*; BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE §§ 1.01-.13 (1962).

ployed had taken the form of charity—public and private. The Depression had made it clear to most people that this response was seriously deficient in two respects. Economically, the community lacked the fiscal organization and resources to meet the exigencies of mass unemployment on a charitable basis;[13] and relief failed to stabilize consumer demand in the crucial incipient stages of a depression.[14] Ethically—in terms of the community values involved—both the techniques of giving charity, particularly the "means" or "needs" test, and the psychological impact of receiving "charity," undermined the self-respect and independence of the unemployed. It was these economic and ethical deficiencies to which the unemployment compensation provisions of the act responded.[15]

The ethical aspect of this new community response lay in the social insurance[16] principle that payments be made to an eligible claimant as a matter of right. Supporters and opponents of the Social Security Act were agreed that in this principle was the essential difference between unemployment compensation and charity.[17] Understanding the phrase "payments as a matter of right" is important because it represents almost the entirety of the legislative history from which one can reconstruct how Congress hoped its fundamental objectives of supporting the dignity and independence of the unemployed would be realized. It appeared ubiquitously in legislative debates and political

13. See Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937); DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 17-18 (1933).

14. See S. REP. No. 628, 74th Cong., 1st Sess. 15 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 8 (1935).

15. *Supra* note 12.

16. "Social insurance" is used herein to refer to a program in which the expectation of payments as a matter of right is purposefully fostered as an ethical goal. It is often used by commentators to refer also to the contributory financing aspect of many of the programs (*e.g.*, old age and survivors' insurance), but that feature of the programs is not directly relevant to the present discussion of the ethical import of unemployment compensation. See note 18 *infra*. "The social insurance principle" is therefore used synonymously with "the principle of payments as a matter of right."

17. See S. REP. No. 628, 74th Cong., 1st Sess. 7 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935). President Roosevelt was strongly committed to the "insurance principle" of unemployment compensation as distinguishing it from "charity." See WITTE, DEVELOPMENT 6, 17-18, 46, 119. For opponents of the act who recognized that it incorporated the social insurance principle, see Gall & Smethurst, *A Critical Analysis of the Federal-State System of Unemployment Compensation*, 3 LAW & CONTEMP. PROB. 123 (1936).

See also the reaction of Justice Black to Justice Harlan's opposite view of social insurance in Flemming v. Nestor, 363 U.S. 603, 623 (1960):

> [The majority opinion] . . . in my judgment, reveals a complete misunderstanding of the purpose Congress and the country had in passing that law. It was then generally agreed, as it is today, that it is not desirable that aged people think of the Government as giving them something for nothing.

Justice Black was in the Senate in 1935. His comment is with specific reference to old age insurance, but it is clear that the Congress of 1935 thought that the same principle of the *right* to benefits was central to both programs. See H.R. REP. No. 615, 74th Cong., 1st Sess. 5 (1935) and S. REP. No. 628, 74th Cong., 1st Sess. 5 (1935).

literature. Unfortunately, no explicit contemporary content was given this crucial phrase; no one explored its ethical ramifications.[18] In order to understand the role which the principle was intended to play in implementing the ethical import of unemployment compensation,[19] it is therefore necessary to

18. Writing as an advocate of unemployment compensation in 1933, Professor (now Senator) Paul H. Douglas summed up its ethical import in the following words:

> In place of the present humiliating, inadequate, and uncertain method of granting relief to the workers through public and private charity, unemployment insurance would provide a much more self-respecting type of protection. Under such a system those who were unemployed through no fault of their own would receive, under certain conditions, benefits which would be theirs by right and which would be definite in amount. . . . A great saving of self-respect and a more decent provision for the fundamental needs of the unemployed and of their families would inevitably result.

DOUGLAS, *op. cit. supra* note 13, at 20.

Representative Doughton, Chairman of the House Ways and Means Committee (which considered the Social Security Act) and one of the two Representatives who introduced the bill in the House, similarly characterized the social insurance principle in speaking on the Act before the House on April 11, 1935:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief.

79 CONG. REC. 5468 (1935).

And see the remarks of Senator George, 102 CONG. REC. 15110 (1956). See also note 17 *supra*.

In connection with the statement of Professor Douglas, it is to be noted that he exemplifies the confusion about and failure to explore the ramifications of the ethical import of unemployment compensation which characterized its supporters in the Thirties. He advocated two conditions precedent to eligibility for benefits—vocational training or productive public work. DOUGLAS, *op. cit. supra* note 13, at 78. He said of these proposals that:

> The only barriers in the way of such a utilization of the energies of the unemployed are: (1) If the workers contribute to the funds from which benefits are paid, they will tend to feel that they have purchased the rights to receive benefits by their own payments and that the state cannot then require them to take on additional activities as a prerequisite for eligibility. . . .

Id. at 79. But, of course, this "barrier" is the very ethical purpose of unemployment compensation he himself had advocated. He goes on, "If the system were non-contributory then the workers might be required to give work or take training even during the period when they receive standard benefits. . . ." *Id.* at 80. This is to make the ethical import of unemployment compensation contingent upon the means of financing the program. If, as the result of conditions precedent to eligibility which Douglas concedes are inconsistent with a conception of the benefits as a matter of right, the worker cannot conceive of his compensation as an accrued right, wherein is the ethical difference between unemployment compensation and relief? Does not the former become merely a sophisticated and regularized form of the latter?

19. For recent attempts to analyze the significance of the social insurance principle, see tenBroek & Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 U.C.L.A.L. REV. 237 (1954) (an excellent and basic article); Smith, *Community Prerogative and the Legal Rights and Freedom of the Individual*, Social Security Bul-

glean the meaning of the phrase from the dichotomy its users posed between the ethical features of unemployment compensation and those of charity.

The phrase has four distinct facets. The most obvious is that the "means" test of public and private charity is abolished in unemployment compensation;[20] payments are a matter of right as opposed to need. Secondly, the phrase embodies the intention that in unemployment compensation, unlike charity, the old maxim that he who pays the piper calls the tune will not hold sway: payments are to be considered rights, earned by the claimant and correlated with the duration and wages of his prior employment or with his direct contributions;[21] they cannot be conditioned upon the possession of such characteristics or the performance of such tasks as the giver of charity can demand.[22] Thirdly, the recipient can be sure in advance of unemployment that his benefits will be paid automatically should he become involuntarily unemployed;[23] his

letin, Aug., 1946, pp. 6-8; Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266 (1949). For discussion of the legal significance of the principle of payments as a matter of right, see note 33 *infra*.

20. H.R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 11 (1935); 79 CONG. REC. 5468 (1935) (remarks of Rep. Doughton, quoted at note 18 *supra*).

21. All states require, as a condition of eligibility, that a claimant have worked a specified amount of time, or have earned a specified amount of wages, prior to becoming unemployed. In this way, the concept of "earning" or "accruing" a right to benefits is recognized even, as in the majority of states, if employees make no direct contributions to the fund. (Exceptions: Alabama, Alaska, New Jersey; seven other states at one time.) The provisions for measuring this prior work and for determining what effect it shall have on the amount and duration of benefits to which claimant is entitled are extremely complex and vary considerably from state to state. See U.S. BUREAU OF EMPLOYMENT SECURITY, DEP'T OF LABOR, BES No. U-141, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS (1960, with 1961 Supp.) 49-83 [hereinafter cited as BES COMPARISON]. See quotations at note 18 *supra*, for the concept of "earning."

That employees make no direct contributions may be unfortunate, since it probably reduces the sense of attachment to the program that otherwise might exist among workers. Employee contributions will create identification with the system and will help workers to conceive of benefits not as charity, "but as amounts which they themselves have helped to accumulate." DOUGLAS, *op. cit. supra* note 13, at 156. Of course, such an effect would be merely psychological, since employer contributions are merely a part of each employer's total labor cost—it is hard to see any real difference between employer contributions and employee contributions withheld by employers.

22. This is the hardest of the four aspects for which to give specific authority; no one in 1935 seems to have been explicit about it (perhaps the reference to "social investigation" by Rep. Doughton quoted in note 18 *supra*, is an exception), though it is implicit in the tenor of many of the contrastings of social insurance with charity. See the articles cited at note 19 *supra*, for more recent investigations of this aspect of the social insurance principle. See also DE SCHWEINITZ, PEOPLE AND PROCESS IN SOCIAL SECURITY 67-76 (1948) for a discussion of the practical difficulties of realizing this aspect in the administration of social insurance programs. *Cf.* the discussion of Douglas' position at note 18 *supra*.

23. See the reference of Professor Douglas to, "the present . . . uncertain method of granting relief" quoted at note 18 *supra*, and DOUGLAS, *op. cit. supra* note 13, at 17-18. See also H.R. REP. No. 615, 74th Cong., 1st Sess. 3 (1935). Certainty of payments is also

payments are accrued rights—he need not worry that a deep-pocketed benefactor of appropriate inclination will not be available. Finally, the phrase refers to the absence from unemployment compensation of the stigma of charity:[24] while most Americans cringe at the idea of receiving charity,[25] our sense of personal dignity does not balk at the idea of receiving benefits to which we can regard ourselves as having earned a right over the years. To generalize from this analysis, "payments as a matter of right" expresses the intention that unemployment compensation foster and make secure the independence (actual and felt[26]) of the individual, his dignity and autonomy, and his sense of economic security. The ethical relation between society and the claimant is that of obligee and obligor, not beggar and benefactor.[27] This, then, is the ethical import of unemployment compensation, as of all social insurance; both in 1935[28] and today[29] it has seemed to most Americans to reflect many of

implicit in one of the economic justifications advanced for unemployment compensation—that it would stabilize purchasing power in the crucial incipient stages of a depression. H.R. REP. No. 615, 74th Cong., 1st Sess. 8 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 15 (1935).

24. This aspect is, like that dealt with in note 22 *supra*, largely implicit in contemporary contrastings of social insurance with charity. For some explicit statements of it, see note 18 *supra*.

25. "Charity at best is both unwelcome and detested by self-respecting workers." DOUGLAS, *op. cit. supra* note 13, at 17. "Many persons consider relief humiliating, and they will suffer almost to the point of starvation before applying for such aid." U.S. SOCIAL SECURITY BOARD, CIRCULAR No. 2, WHAT YOU SHOULD KNOW ABOUT UNEMPLOYMENT COMPENSATION 2 (1937).

26. For discussions of the problem of felt dependency ripening into actual dependency upon the social worker see tenBroek & Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 U.C.L.A.L. REV. 237, 264 and *passim* (1954) (with specific regard to old age and disability insurance); DE SCHWEINITZ, PEOPLE AND PROCESS IN SOCIAL SECURITY 67-76 (1948) (the role of the social worker in preventing the disintegration of autonomy); BAKKE, CITIZENS WITHOUT WORK 285-86, 293, 296-99 (1940) (importance that social welfare programs provide psychological support in the areas of felt autonomy, self-reliance, dignity, etc.); Smith, *Community Prerogative and the Legal Rights and Freedom of the Individual*, Social Security Bulletin, Aug., 1946, pp. 6-8; DOUGLAS, *op. cit. supra* note 13, at 17-18 (1933).

27. Now, as the basis of a claim, law and gratuity are antonyms. He who provides a gratuity is a benefactor. He who must satisfy a legal claim is an obligor. These capacities are antipodal. When you pay your barber and tender him one dollar, saying seventy-five cents is for the haircut and the extra twenty-five cents is a gratuity, he may reply, "Brother, you're no benefactor. The legal charge is one dollar and you're an obligor for the full amount." The challenge is obvious. Then let us be fully aware of the essential challenge in this phrase "the right to security." The agency becomes an obligor and not a benefactor. Presumably this entails a rather basic change of attitude.

Smith, *supra* note 26, at 6.

28. In fact, discussion of the social insurance principle was as limited as it was largely because its desirability was so generally accepted. See H.R. REP. No. 615, 74th Cong., 1st Sess. 43 (1935), Minority Report: "[W]e favor the principle of unemployment insurance . . . and therefore we resolve all doubts in favor of this legislation."

29. Remarks of Senator George, 102 CONG. REC. 15110 (1956). See tenBroek & Wilson, *supra* note 26, at 244. *But see* examination of Arthur J. Altmeyer, *Analysis of the*

the basic values of our society.[30] It necessarily colors the proper construction of the provisions of the Social Security Act.[31]

There are two considerations which might on initial reflection be taken to cast doubt upon the conception of unemployment compensation here attributed to Congress. First, one of the federal standards requires state laws to contain a statement that, ". . . all the rights, privileges, or immunities conferred by such law . . . shall exist subject to the power of the legislature to amend or repeal such law at any time."[32] This clause clearly prevents claimants from asserting any right to benefits as against the power of a state to alter or repeal its law.[33] But other factors lead to the conclusion that the clause is not in-

Social Security System, Hearings Before a Subcommittee of the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 1, at 879-1013 (1953); Wollenberg, *Vested Rights in Social Security*, 37 ORE. L. REV. 299 (1958).

30. See, for an evaluation of welfare programs in the light of these values, tenBroek & Wilson, *supra* note 26.

31. The Supreme Court has almost uniformly interpreted the provisions of the Social Security Act in conformity with the purposes of the act (the possible exception being Flemming v. Nestor, 363 U.S. 603 (1960), discussed in note 33 *infra*). See Social Security Bd. v. Nierotko, 327 U.S. 358 (1946); United States v. Silk, 331 U.S. 704 (1947); Bartel v. Birmingham, 332 U.S. 126 (1947). The only case in which the Court has considered the benefit provisions of an unemployment compensation law, Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143 (1946), did not deal with the possibility of a conflict between its decision and the federal standards (*i.e.* FUTA, INT. REV. CODE OF 1954, § 3304(a) (5)).

State courts have likewise recognized the importance of purposive interpretations of unemployment compensation statutes. See, as an outstanding example, Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 45 A.2d 898 (1946):

> The Unemployment Compensation Law is remedial, humanitarian legislation of vast import. Its beneficial sections must be liberally and broadly construed . . . an employe in covered employments can be denied its benefits only by explicit language in the act which clearly and plainly excludes him.

158 Pa. Super. at 559, 45 A.2d at 904. See also Waterbury Savings Bank v. Danaher, 128 Conn. 78, 82, 20 A.2d 455, 457 (1941). *But see* Department of Industrial Relations v. Tomlinson, 251 Ala. 144, 36 So. 2d 496 (1948).

The shabby treatment meted out by some state courts to those whose religious convictions require them to refuse (or not be available for) allegedly "suitable" work on their Sabbath (Saturday) has a contrary implication. See Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962), *rev'd*, 83 Sup. Ct. 1790 (1963) (on first and fourteenth amendment grounds). Other state courts have rejected this narrow view. See Swenson v. Employment Security Comm'n, 340 Mich. 430, 65 N.W.2d 709 (1954); and Tary v. Board of Review, 161 Ohio St. 251, 119 N.E.2d 56 (1954). See ALTMAN, AVAILABILITY FOR WORK 187-90 (1950) for a good, though already dated, discussion.

32. FUTA, INT. REV. CODE OF 1954, § 3304(a)(6).

33. The author of this Note has found no commentary on this provision contemporaneous with the passage of the Social Security Act, with the exception of brief mention in WITTE, DEVELOPMENT at 71-72, 136 n.80. He states that the provision was inserted in the act at the insistence of Jerome Frank, counsel for the Agricultural Adjustment Administration and representative of Henry Wallace, Secretary of Agriculture, in the final negotiations within the Committee on Economic Security on the proposal to be submitted to Congress. Frank favored eventual conversion to a federal system and abolition of the experience rating provisions of the act; he wished to forestall any *employer* claims to

consistent with the principle of payments as a matter of right. It is not constitutionally vested rights, enforceable against a state's power to change its law, which are crucial to that principle, but rather *perceived* rights.[34] A state

vested rights in their experience ratings which would make such conversion or abolition more difficult. Thus a provision which appears to negative vested rights in employees was apparently designed to prevent vested rights in employers which would obstruct what was thought to be an improvement of the rights of employees. To what extent the same rationale for the provision was known to or adopted by members of Congress, it is impossible to say. It is also probable that the provision was intended to forestall constitutional objections to the act as "coercing" the states.

Of course, there has been considerable controversy since 1935 over the proper interpretation of the provision. Basically, opponents of the social insurance principle have pointed to the provision as proof that no "vested rights" can accrue to claimants under state laws pursuant to the act, and proponents of that principle have sought to explain away its disturbing appearance in various ways.

For opponents see, *e.g.*, Wollenberg, *supra* note 29, at 299; *Hearings Before a Subcommittee of the House Committee on Ways and Means*, *supra* note 29, at 994 (Mr. Winn) and 997 (Mr. Winn and Chairman Curtis). Compare Flemming v. Nestor, 363 U.S. 603, 611 (1960) (opinion by Mr. Justice Harlan), and S. Doc. No. 71, 75th Cong., 1st Sess. 16 (oral argument of Assistant Attorney General Jackson in Helvering v. Davis, 301 U.S. 619 (1937)).

For proponents, see the responses of Arthur J. Altmeyer to the contentions of Rep. Curtis and Mr. Winn during the hearings cited in the previous paragraph. See note 34 *infra* for an interpretation of his position. Mr. Justice Black, dissenting in Flemming v. Nestor, *supra* at 621, interprets the provision as referring only to changes operative in the future (*i.e.* as to those who have not yet accrued expectations); he holds that the right of the claimant, once accrued, is not merely one of expectation, but is of constitutional stature.

There is much discussion in the literature about the difference between a "constitutional" (or "vested") right to benefits (held not to exist for the purposes of Flemming v. Nestor, *supra*) and a "statutory" right and whether rights under social security are the one or the other. The distinction is an almost wholly illusory one insofar as the ethical import of unemployment compensation is concerned. For the statutory right theory is perfectly consistent with the right-to-repeal provisions; in addition, although its supporters generally do not note this, it seems perfectly consistent with the ethical import of social insurance, since that import depends upon the perception of beneficiaries, not the niceties of their legal status vis-à-vis the theoretical possibility of repeal. A statutory right which uniformly fulfills accrued expectations, and which engenders a sense of security that it will continue to do so, serves the ethical import as effectively as a constitutional right would do.

The specific debate in Flemming v. Nestor, *supra*, being concerned with what *Congress* may do with respect to benefit rights, is irrelevant in considering what the states may do *within* the federal standards. The amend-or-repeal provisions reserve such a power to the states but do not relieve them of the requirements of the federal standards should they exercise it.

34. In questioning Arthur J. Altmeyer, a former member of the Social Security Board and, from 1946 to 1953, Commissioner of Social Security, in the Hearings cited at note 29 *supra*, Chairman Curtis and the committee's counsel, Mr. Winn, sought to advance the thesis that social insurance benefits are mere "gratuities."

> Mr. WINN. Has it never occurred to you while you were telling everyone that their benefits would be paid to them as a matter of right that Congress, in the past, had changed the rules and might, in the future, change the rules again?
>
> * * * *

may retain a theoretical power to frustrate accrued expectations to compensation, and at the same time, by uniformly fulfilling such expectations, maintain in covered workers a sense of right to benefits. Furthermore, the retained power to amend is circumscribed by the requirements of the other federal standards; thus to the extent that these other standards embody the principle of payments as a matter of right, the states can violate that principle in exercising their power to amend only at the price of being found out of conformity to the federal standards. The second consideration begins with the observation that congressional reaction to unemployment has always reflected concern with two needs: the needs of the unemployed and those of the national economy. The Social Security Act itself had an economic aspect as well as its dominant ethical one.[35] In subsequent legislation, however, Congress has frequently seemed more concerned with the needs of the national economy. Some of this subsequent legislation has impinged in various ways upon the unemployment

---

Mr. ALTMEYER. It occurred to me that Congress would amend the law from time to time to make it more valuable by way of providing protection; yes sir. It did occur to me, and I think that is one of the wonderful things about a statutory right.

* * * *

Mr. WINN. We have . . . established that the recipients of these benefits have no claim to the benefit as a matter of right, that is that they may be taken away by Congress at any time . . . is that correct?

Mr. ALTMEYER. Non sequitur between your first and second sentence.

Mr. WINN. . . .We have . . . established that the recipients of these benefits have no claims to the benefits as a matter of right; is that correct?

Mr. ALTMEYER. It is not.

* * * *

Mr. WINN. On the other hand, recipients of these benefits may have them taken away by Congress at any time and in certain instances they have been taken away; is that correct?

Mr. ALTMEYER. By the substitution of more valuable rights in the vast majority of cases. You get isolated cases where that has not occurred.

Chairman CURTIS. However, if they can take them away from one individual . . . they can take them away from all of them.

Mr. ALTMEYER. Again you are impugning Congress and I would not presume to do so.

Id. at 994-97. Note that Altmeyer is concerned not with the *legal* status of the social insurance principle, but with its impact (ethical and psychological) upon the recipient, and that from that perspective it is what Congress (or a state) *does* (and leads those covered to expect it to continue to do) which is crucial, not what it has the theoretical *power* to do. Expectations, not constitutional rights, are involved. Thus Altmeyer would probably argue that in the "isolated cases" in which accrued expectations were frustrated, Congress should have been more scrupulous to protect expectations and thus to preserve the ethical impact of the social insurance principle. See note 33 *supra*.

35. It is clear from the legislative history of the act that its ethical import far outweighed its economic import in the eyes of Congress. Indeed, none of the standards for the tax off-set are concerned with the economic aspect of the program—with the possible exception of (a)2, which is merely designed to ensure the solvency of state funds. See text of the standards at note 57 *infra*.

compensation program; for example, when economic conditions have warranted it, extended benefits have been provided, essentially gratuitously, for those who have exhausted the benefits to which they had a right.[36] It could be argued that in doing so Congress has manifested a conception of the unemployment compensation program primarily directed to economic needs. But it certainly does not follow from the fact that Congress has in other legislation directed its attention to such problems as stabilization of consumer demand and efficient provision for the casualties of a changing economy rather than to implementation of the social insurance principle, either that it conceives the Social Security Act as having a primarily economic rather than a primarily ethical import, or that it desires to substitute an economic for the ethical conception of unemployment compensation. And the community values which underlay the original conception of the program seem equally relevant for the American community today.[37]

Despite widespread recognition of the deficiences of charity as a response to the problems of the unemployed, only one state[38] had been willing, by 1935, to submit its employers to the tax burden of an unemployment compensation program—a burden which would not necessarily be imposed upon their out-of-state competitors. This state reluctance to "go it alone" led most proponents of unemployment compensation to recognize that federal action was needed if any program was to be established.[39] A wholly federal program would

36. See, for example, Temporary Extended Unemployment Compensation Act of 1961, 75 Stat. 8 (1961), 42 U.S.C. § 1400 (1)-(v) (Supp. IV, 1963).

37. Note 19 *supra*. See also two articles by A. Delafield Smith, former Assistant General Counsel, Federal Security Agency. Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266, 288 (1949), and Smith, *Community Prerogative and the Legal Rights and Freedom of the Individual*, Social Security Bulletin, Aug., 1946, p. 6:

> [I]n order to maintain a free society under modern conditions, security must be framed in terms that respect one's sense of autonomy. Individual choice must remain uncontrolled, unprejudiced, and free. We require the type of assistance that fortifies, but does not seek to govern, our wills.

Id. at 8.

38. Wisconsin. See note 12 *supra*.

39. See Witte, *Historical Account* 168; Witte, *Development of Unemployment Compensation* 29; Huntington, *The Benefit Provisions of State Unemployment Insurance Laws*, 3 LAW & CONTEMP. PROB. 20, 35 (1936); S. REP. No. 628, 74th Cong., 1st Sess. 16 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 8 (1935); 79 CONG. REC. 5539 (1935) (remarks of Rep. S. B. Hill). *Cf.* Steward Machine Co. v. Davis, 301 U.S. 548, 588 (esp. n.9) (1937). Those who today favor stricter federal standards do so, to some extent, for the same reason; and, conversely, those who oppose liberalization of benefit provisions oppose new federal standards which would make it easier for the states to make benefit provisions more favorable to claimants by removing the factor of economic rivalry. See Letter from Joseph J. Gibbons, Executive Director, Employment Security Division, Connecticut Labor Department, April 16, 1963:

> Whether one is for or against federal standards seems to depend pretty much on whether one is claimant-oriented (pro) or employer-oriented (con). Those most violently antagonistic to federal standards are nevertheless in favor of one—the experience-rating standard which permits employer tax rates lower than the normal 2.7% tax and subjects the country to the very interstate competition for low tax

have been possible.[40] But due to strong congressional opposition to "federal control,"[41] the Committee on Economic Security,[42] appointed by President Roosevelt to draft the Social Security Act,[43] ultimately decided to recommend to Congress a tax off-set plan whereby payments by an employer into a state unemployment compensation fund could be set off against a special federal tax on employers,[44] if the state plan satisfied minimal federal requirements for qualification as an unemployment compensation program.[45] It was this plan which was enacted.

---

rates (obtainable only by low benefit structures) which the original tax was designed to prevent. The same individuals are violently opposed to federal standards for benefit levels.

See also Temple & Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 VAND. L. REV. 376, 401-05 (1955). And see note 51 *infra* for a discussion of experience rating.

40. This mode of federal action was adopted for the old age and survivors insurance provisions of the act. Social Security Act, titles II and VIII, 49 Stat. 620 (1935). See, for the current versions, SSA, 42 U.S.C. §§ 201-24 (1958) and INT. REV. CODE OF 1954, §§ 1401-03, 3101-26. According to Witte, the old age insurance provisions of the act were far more popular than its unemployment compensation provisions. This may explain why it was felt possible to seek, and why Congress approved, a wholly federal system with respect to those provisions. WITTE, DEVELOPMENT 78-79, 91.

41. WITTE, DEVELOPMENT 195. See the reassuring remarks of Rep. Doughton and Senator Harrison, 79 CONG. REC. 5475 and 9271, respectively (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 8-9 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 4 ("Less Federal control is provided tha in any recent Federal aid law."), 12, 13 (1935).

The "federal control" problem has been with unemployment compensation all along. See BECKER, THE PROBLEM OF ABUSE IN UNEMPLOYMENT BENEFITS 7, 23-27 (1953) for the use of the "federal control" arguments by opponents of a substantial emergency reconversion unemployment compensation plan in 1944 and 1945. And see Witte, *Development of Unemployment Compensation*, 46-48 and 48-51 on the 1939 and 1943-45 proposals respectively, to increase substantially "federal control." The Kennedy Administration's current proposal for revision of the unemployment compensation program S. 1542, H.R. 6339, 88th Cong., 1st Sess. (1963) [hereinafter cited as Administration Bill], includes many of the elements of these previous proposals—*e.g.*, minimum benefits, extended coverage, and a permanent federal program for those who have exhausted their state benefits —and will undoubtedly meet the same objections. *Cf.* H.R. REP. No. 1818, 87th Cong., 2d Sess. 30 (1962).

42. See note 12 *supra*, for the background of the Committee.

43. According to Witte, President Roosevelt favored a federal-state program. WITTE, DEVELOPMENT 119-22.

44. Three modes of federal action were considered: a wholly federal program, federal subsidies to the states, and the tax off-set plan. The major debate on the committee was between supporters of a federal program and supporters of a federal-state program. WITTE, DEVELOPMENT 115-16. When the possibility of a wholly federal program was dismissed by the committee as politically impossible for unemployment compensation, WITTE, DEVELOPMENT 87, 118, those who had desired a federal program supported a subsidy program, on the theory that more federal requirements could be included therein, and that such a plan could be more easily converted into a wholly federal program. WITTE, DEVELOPMENT 116. See note 40 *supra*.

45. See notes 57-60 *infra* and accompanying text.

The tax off-set plan works approximately as follows: A federal tax of about 3 per cent[46] of wages paid[47] is levied on all employers[48] of four or more.[49] An employer may credit against up to 90 per cent[50] of this tax (*i.e.* may set off up to 2.7 per cent, leaving only 0.3 per cent owing to the federal government) such amount as is paid by him in a given taxable year into ". . . an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified. . . ."[51] Thus

46. Three per cent was the permanent rate set by the original act, though somewhat lower rates were set for two introductory years. Social Security Act, § 901, 49 Stat. 620, 639 (1935). The permanent rate has been slightly raised and is now 3.1%, but 3.5% for 1962 and 1963. FUTA, INT. REV. CODE OF 1954, § 3301. The Administration Bill proposes to set the permanent rate at 3.4%. *Id.* at tit. II, § 201. A three per cent tax is assumed hereafter for the sake of simplicity.

47. The tax is levied only on the first $3,000 of annual wages of a given employee. FUTA, INT. REV. CODE OF 1954, § 3306(b). Compare Administration Bill, tit. II, § 204 ($5,200).

48. There are a large number of specifically excluded employments, the most important being agricultural labor and services for non-profit organizations. FUTA, INT. REV. CODE OF 1954, § 3306(c). Section 202 of title II of the Administration Bill, proposes to increase occupational coverage only as to employment by non-profit organizations.

49. Coverage was changed from eight or more employees on each of twenty days during the taxable year in the original act to four or more in 1954, to be effective after Dec. 1, 1955. FUTA, INT. REV. CODE OF 1954, § 3306(a). Section 201 of title II of the Administration Bill, proposes to extend coverage to employers of one or more.

50. FUTA, INT. REV. CODE OF 1954, § 3302(c)(1).

51. FUTA, INT. REV. CODE OF 1954, § 3302(a)(1). Though set out somewhat differently, the plan was the same in §§ 901 and 902 of the original Social Security Act, 49 Stat. 620, 639 (1935).

In addition to crediting amounts actually paid into a state fund, an employer may also credit amounts he would have had to pay but for his favorable "experience rating" (or "merit rating") under that state's law. An experience rating depends upon an employer's past record in maintaining full employment—his "unemployment risk." It comes in a number of variations, subject to the federal standards. FUTA, INT. REV. CODE OF 1954, § 3303(a)1-3. Although this feature of unemployment compensation is not directly relevant to the subject matter of this Note, it is important to note that the interest of employers in maintaining a favorable experience rating—thus lessening their state tax without corresponding increase in the federal tax—leads them to contest the eligibility of former employees and to oppose liberalization of eligibility provisions. It is the view of one state's administrator that the specific features of a given state's experience rating plan can have an enormous impact upon the intensity of employer concern with whether or not their former employees are compensated—depending upon the directness of the relation between an employer's tax rate and the amount of compensation paid to his former employees. In his view, the variations in this intensity from state to state are reflected in the eligibility provisions and the tenor of administration of the various state programs. He also asserts that in order to maintain their one-sided power with respect to the features of unemployment compensation, employers have resisted proposals for employee contributions which would give employees the same political "standing" before state legislatures which employers now enjoy. Interview with Joseph J. Gibbons, Executive Director, Employment Security Division, Connecticut Labor Department, in New Haven, Conn., June, 1963.

The intrusion via the impact of the experience rating system, of a party whose interest is irrelevant to the ethical purpose of unemployment compensation, has led those

every employer in every state must in theory pay—whether to state or federal government—a total tax of at least 3 per cent.[52] In this way, the bulk of the pressure of economic rivalry among the states, which had prevented them from adopting their own unemployment compensation plans,[53] was eliminated. The act also provided positive inducements for the states to enact certifiable plans: title III [54] made available to the states federal grants to cover the administrative costs of their unemployment compensation plans;[55] and only by enacting such a plan could a state retain control over the tax receipts and ensure that they would be spent domestically. The inducements were successful: every state had enacted its own plan by 1937.[56]

To distinguish those state laws which are from those which are not appropriate responses to the federal act in light of the congressional purpose, federal standards were established, setting minimum prerequisites for a state's law, in its terms and its administration, to be considered an unemployment compensation law.[57] Beyond this minimum, the substance of state laws is left

---

who favor that purpose to refer to experience rating as having "poisoned" the whole of the program. It would seem that the original purpose of experience rating—to encourage and reward stable employment policies—might, if desirable at all, be accomplished in some way which would not inject the employer into eligibility determinations and which would decrease the direct self-interest of employers in harsh eligibility provisions.

For a general discussion of experience rating see Temple & Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 VAND. L. REV. 376 (1955).

52. Experience rating destroys this uniformity to some extent. See notes 39 and 51 *supra*. A number of states have a tax higher than the maximum 90% of the federal tax which is allowed as a set-off against the federal tax—thus subjecting their employers to more than the national minimum tax. BES COMPARISON 45.

53. See note 39 *supra*.

54. Social Security Act, 49 Stat. 620, 626. For the current provision see SSA, 42 U.S.C. §§ 501-03.

55. These reimbursement grants, being a subsidy-type program (see note 44 *supra*), involve somewhat more federal supervision than the tax off-set provisions of the act.

56. BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT COMPENSATION § 1.05, at 12 (1962). Employers were undoubtedly very concerned that their states pass a law, since the benefits of experience rating only exist if a state's law provides for it.

57. See S. REP. No. 628, 74th Cong., 1st Sess. 4, 13 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 8-9 (1935); 79 CONG. REC. 5475 (remarks of Rep. Doughton), 9271 (remarks of Senator Harrison) (1935); Steward Machine Co. v. Davis, 301 U.S. 548, 575, 578, 590-91, 593-94 (1937); 39 OPS. ATT'Y GEN. 242, 246-47 (1939); U.S. SOCIAL SECURITY BD., PUB. No. 14, UNEMPLOYMENT COMPENSATION—WHAT AND WHY? 33 (March, 1937). The standards for certification for the tax off-set are, in full:

> (a) The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> (1) all compensation is to be paid through public employment offices of such other agencies as the Secretary of Labor may approve;
>
> (2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;
>
> (3) all money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 3305(b)) immediately upon such receipt be paid

to state initiative and discretion. In light of the legislative history, it is to be anticipated that one of these federal standards would require the states to recognize the ethical import of the federal act in their own acts; the only candidate is the following:

> (a) The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that —
>
> (4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation . . . [with exceptions not important here].[58]

"Compensation" is defined as, ". . . cash benefits payable to individuals with respect to their unemployment."[59] Since the Secretary of Labor is elsewhere given not only the responsibility for initial determination of conformity, but also the authority to de-certify a state law which is amended, interpreted, or administered out of conformity,[60] the provision serves effectively to prohibit

---

over to the Secretary [of the Treasury] to the credit of the Unemployment Trust Fund established by . . . [SSA, 42 U.S.C. § 1104];

(4) all money withdrawn from the unemployment fund of the State shall be be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b) except that —

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by . . . [SSA, 42 U.S.C. § 1103(c)2] may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6) all the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

FUTA, INT. REV. CODE OF 1954, § 3304(a). There are additional standards for certification for reimbursement, relating primarily to efficiency and fairness of administration. SSA, 42 U.S.C. § 503(a).

58. FUTA, INT. REV. CODE OF 1954, § 3304(a). The provision in the 1935 act was substantially the same. Social Security Act, § 903(a), 49 Stat. 620, 640.

59. FUTA, INT. REV. CODE OF 1954, § 3306(h).

60. Since all state laws long since received their original certification, what is important now is the Secretary of Labor's power to de-certify in the event of an amend-

any payments to individuals, other than those made payable with respect to their "unemployment."

In response to this federal requirement of payments with respect to "unemployment," the states have enacted a number of conditions precedent to eligibility for unemployment compensation, designed to define "unemployment."[61] Although the Social Security Act left great discretion to the states to formulate that definition,[62] all state plans have in fact adopted essentially

---

ment, interpretation or administrative practice which renders a formerly certified law no longer compatible with the standards. FUTA, INT. REV. CODE OF 1954, § 3304(c).
Two grounds of de-certification are provided for: non-conformity if a statutory amendment should remove a required provision or add a forbidden one; and non-compliance if a state's interpretation or administration of its law fails to comply substantially with the required provisions. These are but two sides of the same coin: it is as necessary that practical conformity—compliance—be maintained as that textual conformity exist. "Conformity" is used loosely in the text to refer to both aspects of a state's obligation. See SSA, 42 U.S.C. § 503(b) for analogous provisions as to reimbursement.

It has been contended that the "substantial compliance" requirements of § 3304(c) of FUTA, *supra*, demand only compliance with the required provisions in a state's own law, as interpreted by a state's own courts. See Brief for the Inter-Association Unemployment Insurance Committee as Amicus Curiae, pp. 13-25, Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 27 Cal. Rptr. 878, 378 P.2d 102 (1963). This position was rejected by the Hearing Examiner, the Special Advisory Panel, and the Secretary of Labor in the 1955 hearings to the California Department of Employment pursuant to the decertification provision set forth above, on the grounds that it would destroy the uniformity of the federal standards and frustrate the congressional purpose to require all state laws to measure up to the federal requirements of a "genuine unemployment compensation law." Appellant's Supplemental Brief appendices "F" (at 8-9), "G" (at 12-13) and "E" (at 3-4) respectively, Ruberoid Co. v. California Unemployment Ins. Appeals Bd., *supra*. Thus the states have not only an initial obligation to measure up to the federal standards, but a continuing obligation to do so in substance as well as form.

61. Most states also limit coverage to employees of an employer who has had a specified number of employees for a specified number of weeks per year (or who has a specified minimum payroll). The coverage of the federal tax is currently limited to employers of four or more. FUTA, INT. REV. CODE OF 1954, § 3306(a). All states allow a firm to elect coverage. BES COMPARISON 1-5. Coverage is also limited to those in the employer-employee relationship—definitions of which vary greatly. *Id.* at 5-8. Judicial definition of "employee" under the federal acts was initially broad. See United States v. Silk, 331 U.S. 704 (1947); Bartels v. Birmingham, 332 U.S. 126 (1947). *But see* the "Status Quo Resolution," 62 Stat. 438 (1948) for the congressional reaction. A uniform definition of employment has been adopted by the states with respect to the locus of employment in inter-state occupations. BES COMPARISON 8-9. All states exclude specified industries from coverage altogether; these exclusions generally follow closely the exclusions from coverage of FUTA, INT. REV. CODE OF 1954, § 3306(c). The most important exclusions are agricultural labor, domestic service, employment by a non-profit organization, and employment by a state or local government; there are a host of minor exclusions which occur in but a few states. BES COMPARISON 9-15.

62. See 79 CONG. REC. 9271 (1935) (remarks of Senator Harrison); H.R. REP. No. 615, 74th Cong., 1st Sess. 8 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 13 (1935); U.S. SOCIAL SECURITY BD., PUB. No. 14, UNEMPLOYMENT COMPENSATION—WHAT AND WHY? 33 (March, 1937); Witte, *Historical Account* 169. See also FEDERAL SECURITY

the same definition,[63] as reflected in the benefit provisions of their laws. These provisions are generally of two sorts. Some go primarily to whether a claimant is, although out of work, "attached to the labor market," *i.e.* to whether his unemployment is due to economic,[64] or labor-market, conditions or to sickness, old age, voluntary withdrawal from the labor market (*e.g.* students[65]), etc. These are known as *eligibility conditions*. The eligibility conditions are generally compressed into the formula that a claimant must be "able and available" for "suitable work."[66] This formula covers such subsidiary factors as the extent of disability which renders a claimant "unable,"[67] the types and conditions of work for which he must make himself "available," the quality of the status "available for work," and the prima facie showing of ability and availability which he must make. Those conditions which go primarily to whether the claimant is involuntarily unemployed[68] are known as *disqualifi-*

AGENCY, EMPLOYMENT SECURITY MEM. No. 1, COMMENTARY ON THE UNEMPLOYMENT COMPENSATION PROVISIONS OF THE "SOCIAL SECURITY ACT AMENDMENTS OF 1939" iv (Nov. 1939).

63. For the benefit provisions of the various state laws, see generally BES COMPARISON. There is a great variation in the contribution—*i.e.* financing—provisions; for example, three states require employee as well as employer contributions. *Id.* at 18.

64. "Economic" must be taken broadly in this context: lack of a Ph.D. would not be considered a non-economic cause of unemployment rendering a claimant ineligible if jobs were available for Ph.D.'s. But see the argument in favor of the eligibility of vocational trainees at text accompanying notes 103-04 *infra*.

65. As of September, 1962, all but 20 states considered participants in vocational training courses "unavailable." Letter From Robert C. Goodwin, Administrator, Bureau of Employment Security, U.S. Department of Labor, Sept. 21, 1962. Section 207 of the Administration Bill will require the states to pay benefits to otherwise eligible trainees.

66. For a detailed treatment see ALTMAN, AVAILABILITY FOR WORK (1950).
WORK (1950).

67. *Id.* at 139-57.

68. Why social support for the unemployed—let alone those unemployed who have "earned" such support under a social insurance program—should be limited to the involuntarily unemployed is itself an interesting question. American society is certainly capable of supporting those who would choose to live off their unemployment benefits. Such benefits are not an adequate psychological alternative to employment for the normal American. See BAKKE, THE UNEMPLOYED WORKER 7 (1940):

> This justification for one's activity, this social role, is no intellectual construction. It depends on constant function to give it validity. That is one reason why a dole can never become a substitute for work in the minds of the majority of workers.

Karl Polanyi has argued that society need not depend on the compulsion inherent in disqualification for voluntary unemployment. POLANYI, FULL EMPLOYMENT AND FREE TRADE 100 (1948). And, in fact, in another civilization in which the contributions of every person are far more crucial than in our own, and in which there is consequently a strong social pressure to maintain the equivalent of "full employment," the voluntarily "unemployed" are nevertheless "compensated." See BIRKET-SMITH, THE CARIBOU ESKIMOS (V REPORT OF THE FIFTH THULE EXPEDITION 1921-24), pt. 2, at 261 (1929):

> At Kazan River I met a Harvaqtormio, an idle and unreliable fellow, who had gambled away his rifle and other property. . . . [H]e travelled around to different camps as an undoubtedly very unwelcome guest. Such a man will not starve to

cations.[69] Thus, both voluntarily quitting a previous job and refusing an offer of suitable work entail disqualification.[70] Together, "these eligibility and disqualification provisions delineate the risk which the laws cover. . . ."[71] They limit that risk, in effect, to involuntary unemployment due to economic conditions; that this was the congressional understanding of "unemployment" is amply supported in the legislative history of the act.[72] There are also a number of conditions imposed as necessary precedents to eligibility, which cannot easily be classified as eligibility conditions or as disqualifications, some of which do not appear to be responses to the requirement to define "unemployment." The loyalty oath requirement is an example.

The conformity of particular conditions to the federal requirement that payments be made with respect to "unemployment" depends upon the interpretation of that requirement adopted by the Secretary of Labor. In the process

---

death, for no one will deny him a meal; but he will be more or less regarded by everybody as a pariah.

See also Hoebel, *Law-Ways of the Primitive Eskimo*, 31 J. CRIM. L. & C. 663 (1941).

There is much to be said for the proposition that socially undesirable conduct should be directly prohibited—that social insurance benefits should not be conditioned upon behavior not exacted of other members of society. See tenBroek & Wilson, *supra* note 26, at 271. Thus if full employment is socially necessary, idleness could be punished directly.

69. BES COMPARISON 88-119.

70. The notion of involuntariness becomes somewhat attenuated in the two other major disqualifications: discharge for misconduct, and unemployment due to involvement in a labor dispute. In addition, most states disqualify for unemployment due to pregnancy (note that this is not the same as *inability* due to pregnancy, since it extends beyond the period of incapacitation) and due to marital obligations (*e.g.* moving to join husband—*but cf.* Sturdevant Unemployment Compensation Case, 158 Pa. Super. 548, 45 A.2d 898 (1946) (quitting work to accompany husband to a new domicile is with "good cause" since a wife has a duty to do so)). BES COMPARISON 105-07. An alternative source of income is also often grounds for disqualification, though this would seem to come close to imposition of a "needs" test. *Id.* at 113-19.

The essential difference between eligibility conditions and disqualifications is that ineligibility can only terminate when the conditions causing it are no longer operative, whereas disqualification creates a discrete period of X weeks, or re-employment plus X weeks—and/or a reduced level of benefits—as to which a claimant is not eligible. See BES COMPARISON 98-102 for the provisions in the event of a refusal of suitable work.

71. *Id.* at 85. The generalizations in the text with respect to these provisions are necessarily very gross—each state's provisions are riddled with statutory and interpretive presumptions, burdens of proof, exceptions, special qualifications, definitions of substantive effect, etc. However, a gross view is all that is needed for the purposes of this Note.

While the formulation of the various benefit provisions is fairly uniform, the quantitative variables of those formulations differ enormously—the most obvious example being that while every state's law provides for the payment of benefits, the amount of such benefits ranges, in minima, from $3 per week to $17 per week, and in maxima, from $26 per week to $70 per week. *Id.* at 65-66. See, for other examples, *id.* at 56, 59, 76, 90-114. But the quantitative variables go to the sufficiency, not the character, of unemployment compensation and are hence not directly relevant to the problems considered in this Note.

72. See, *e.g.*, S. REP. No. 628, 74th Cong., 1st Sess. 11-12 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 3-7 (1935).

of enforcing adherence to the federal standards,[73] it is the Secretary's respon-

73. See De Vyver, *Federal Standards in Unemployment Insurance*, 8 VAND. L. REV. 411 (1955), for an excellent account of the enforcement of conformity.

An informal process is the usual procedure for maintaining conformity and compliance. While hearings have occasionally proved necessary, the ultimate sanction of decertification has almost never been used. There was but one case of an initial refusal to certify, there has never been a year-end refusal to recertify under the tax off-set provisions of the act, and there has been but one case of a refusal to certify for federal reimbursement grants. See Witte, *Development of Unemployment Compensation*, 33 and De Vyver, *supra* at 416, 421-22.

The informal process works as follows: proposed amendments are usually discussed in advance with the Labor Department staff, which may be able to demonstrate to the state administrator (or other proponent) how a potential conformity problem may be avoided. If an amendment poses a clear conformity problem, its proponent will usually not pursue it; state legislatures likewise take conformity into account; and if all else fails, governors have vetoed legislation when the Department indicated that a serious possibility of decertification would follow passage. The informal process works in a similar way to prevent and to cure administrative interpretations and rules which the Department considers non-complying. De Vyver, *supra* at 415-34.

Although, given the relationship of the parties, it might have been reasonable to expect considerable strain in the enforcement process, the experience of most states has been good. A typical response of state administrators to questions concerning their experiences with the federal-state relationship was:

> We have always been able to comply with the requirement of Federal standards . . . without any operating difficulty. Although there have been differences of opinion, these have always been satisfactorily resolved. [Letter From Jack B. Brown, Executive Director, Bureau of Employment Security, Pennsylvania Department of Labor and Industry, April 22, 1963.]

See, to the same effect, letters from unemployment compensation administrators in the following states: California, Connecticut, Massachusetts, Missouri, New Jersey, New York, North Carolina, Oregon, and Washington. Some of the explanation for the smoothness of relations may lie in inadequacy of enforcement. At least one state administrator —who favors the enforcement of the federal standards—alleges that the standards are in fact "honored more in the breach than in the observance, and . . . the raising of these issues are rare occurrences." Letter From Joseph J. Gibbons, Executive Director, Employment Security Division, Connecticut Labor Department, May 23, 1963.

The decisions in conformity hearings are apparently not published and it is consequently difficult to discover very much about them except obliquely. The following are some of the more important:

1947, Minnesota. Findings: non-conformity. Result: federal law amended to preserve conformity of Minnesota law. See Feldman, *Conformity in Unemployment Compensation Insurance*, 7 LAB. L.J. 201, 206 n.24 (1956).

1949, California. Hearing terminated upon assurance from State Unemployment Compensation Appeals Board that decisions on which the charge of non-conformity was based were erroneous. See Hearing Examiner's Opinion, 1955 hearing, Supplemental Brief, appendix "F," p. 10; Feldman, *supra* at 211; De Vyver, *supra* at 417.

1949, Washington. Finding: non-conformity. Result: state law amended. See Feldman, *supra* at 211; De Vyver, *supra* at 417.

1955, California. Findings: no substantial non-compliance. See Supplemental Brief, appendices, for the decisions of the Secretary of Labor, his Special Advisory Board, and the Hearing Examiner.

sibility to interpret them.[74] Insofar as his power to do so is seen in its legal aspect, it is probably limited only by judicial relief for "abuse of discretion."[75] Given the cryptic quality of the standards, such abuse would be very difficult to show. Congress having provided for enforcement by the Secretary, the courts would presumably be loath to intervene. However, insofar as the Secretary's power of interpretation is seen in its political aspect, it has clear limits. In interpreting and applying the standards he must maintain workable relations with state administrators and must not so act as to convince a substantial number of Congressmen that he is usurping the congressional role and injuring their constituents by unwarranted[76] constructions of the statu-

---

The conformity issue can be raised in quite a different context from that considered in this Note: the necessity of maintaining conformity can be urged upon a court as a guide in interpreting its state's law. See Feldman, *supra*, for a general treatment of the problem. Some courts have adopted the attitude that conformity is none of their concern in interpreting their states' laws. See, *e.g.*, Employment Security Bd. v. Maryland Deliveries, Inc., 204 Md. 533, 105 A.2d 240 (1953). The California courts seem to be particularly receptive to the conformity problem as an interpretive device. See Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 59 Cal. 2d 83, 27 Cal. Rptr. 878, 378 P.2d 97 (1963); Barber v. California Employment Security Comm'n, 130 Cal. App. 2d 7, 278 P.2d 762 (1954). The California Supreme Court has taken "judicial notice of the public policy of this state to establish and maintain conformity. . . ." Pearson v. State Social Welfare Bd., 54 Cal. 2d 184, 189, 5 Cal. Rept. 553, 555, 353 P.2d 33, 35 (1960).

74. The Secretary of Labor in his decision in the 1955 hearings unequivocally took the position that his duties of enforcement under FUTA, INT. REV. CODE OF 1954, §§ 3301-09, require him to make certification determinations on the basis of his own interpretation of the federal standards. Supplemental Brief, appendix "E," pp. 3-4. In doing so he followed the recommendations of the Department of Labor's Hearing Examiner (Supplemental Brief, appendix "F," p. 9) and his Special Advisory Panel (Supplemental Brief, appendix "C," pp. 15-16). In view of the cryptic nature of the standards (see note 57 *supra* and text accompanying notes 75-76 *infra*), it is almost inconceivable that Congress could have intended the Secretary to be responsible for enforcing them but not to be responsible for interpreting them—particularly since no other organ of interpretation was provided.

The Secretary is not limited, in his power to deny or to revoke certification, by the requirements of the federal standards. Some additional standards may be said to be implicit—either as requirements of all federal legislation (*i.e.* constitutional requirements) or as immanent in the scheme of the legislation as a whole. The Secretary of Health, Education and Welfare has disapproved state aid to needy children plans on both grounds, finding that they do not meet the requirements for federal subsidization. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1358-59 (1963).

75. See Parker, *Administrative Law Problems in the Unemployment Insurance Program*, 8 VAND. L. REV. 436, 440-41 (1955); 108 CONG. REC. 771, 87th Cong., 1st Sess. (1962) (memorandum of Rep. Brown).

76. Sometimes "warranted" interpretations and applications thereof are objected to by Congressmen. This may be either simply because a given Congressman does not want the plain requirements of the federal standards enforced, or because new circumstances have arisen in which change in the standards is needed. For example, in 1947 the Minnesota law was disapproved due to an amendment not in conformity with the standards. The federal law was quickly amended, 61 Stat. 416 (1947).

tory language.[77] These limits, as well as the smooth relations which have usually been enjoyed with state administrators, may explain the rarity with which the hearings which mark the formal exercise of this power have been called. So long as he remains within a recognizable and acceptable conception of the federal standards, however, the Secretary's action should be politically defensible as well as judicially unimpeachable.[78]

Not only does the Secretary have the power of interpretation, but if the federal standards are to be significant factors in effectuating the congressional purpose they must be broadly and purposefully construed. Narrowly construed, the standards would not suffice to distinguish a "genuine unemployment compensation law,"[79] expressive of the ethical principles Congress sought to advance, from other state laws not expressive of these principles. For example, there is no explicit prohibition of a "means" test anywhere in the standards, although the committee reports [80] and congressional debates [81] on the Social Security Act make clear that the absence of that condition precedent

77. Most of these political limitations are of the obvious variety. For the purposes of this Note, the role of Congress as state legislature for the District of Columbia imposes a particularly important limitation. Although the District of Columbia is treated as a state under the federal acts (see note 1 *supra*), and although the Secretary probably could, in theory, decertify the District's unemployment compensation law for non-conformity, it would obviously be politically impossible for him to do so. Similarly, he is precluded from decertifying a state's law for including a provision which the District's law contains. However, this political limitation would not apply to his power to make a finding of non-compliance by the District or the states with the requirements of the standards. See note 60 *supra* for the distinction between conformity and compliance. And see text accompanying notes 108-09 *infra*.

78. A part of political defensibility is that a decertification decision be made promptly —otherwise a form of political estoppel sets in, which makes it more and more difficult to challenge policies which have been tolerated for increasing periods. See, for an argument of such estoppel, Brief for the Inter-Association Unemployment Insurance Committee as Amicus Curiae, pp. 25-30, Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 59 Cal. 2d 83, 27 Cal. Rptr. 878, 378 P.2d 97 (1963).

79. This phrase is ubiquitous—it appears in virtually every early commentary on the federal standards provisions of the unemployment compensation section of the Social Security Act. See, *e.g.*, H.R. REP. No. 615, 74th Cong., 1st Sess. 9 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 13 (1935); 39 OPS. ATT'Y GEN. 242, 246-47 (quoting the above two committee reports); Steward Machine Co. v. Davis, 301 U.S. 548, 578 (1937) (upholding the constitutionality of the unemployment compensation sections of the act). This ubiquitousness is undoubtedly due to Witte's influence; for instance, it was he who wrote the argument sections of the above committee reports. WITTE, DEVELOPMENT 98, 104. One suspects he used it as a palliative to calm the fears of the opponents of "federal control." Though it may have been beneficial in this respect, unfortunately it was substituted for any clear statement of congressional intent. Probably most of those who used the phrase conceived it as a compendious reference both to the elements of the ethical import of unemployment compensation and to some form of contributory financing. See S. REP. No. 628, *supra* at 13 ("genuine unemployment compensation acts and not merely relief measures . . .").

80. S. REP. No. 628, 74th Cong., 1st Sess. 11 (1935); H.R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935).

81. *E.g.*, 79 CONG. REC. 5468 (1935) (remarks of Rep. Doughton).

to eligibility was considered the single most characteristic feature distinguishing unemployment compensation from relief.[82] The requirement that payments be made only "with respect to unemployment," if read in light of the principle of social insurance, does prohibit a "means" test: a payment predicated upon the satisfaction of the "means" test is made not with respect to "unemployment," but with respect to "needy unemployment." "Unemployment" *plus* need, or *plus* the possession of some desirable moral quality or the performance of some laudable act, is an impermissible basis for payments. The congressional purpose to eliminate the "means" test reinforces what is a natural reading of the federal standard to include the social insurance principle.

If, in interpretating and applying the requirement of payments with respect to "unemployment," the Secretary were to consider only the adverse impact on the social insurance principle of a condition insisted upon as a precedent to payment of benefits, he would necessarily be put in the embarrassing position of finding all such conditions, even the common eligibility conditions and disqualifications, non-conforming—at least in their application. Such a result follows from the need for objective definition[83] of any test which is to be

82. The Bureau of Employment Security of the Department of Labor has in fact taken the position not only that a means test is non-conforming *per se*, but that analogous provisions would be. One such analogous provision was proposed in South Dakota in 1963: the waiting period between application and eligibility for benefits was to be increased in stages for individuals with various levels of earnings—thus the higher his normal earnings, the longer a claimant would have to wait before being eligible.

83. "Objective definition" here means that the applicability of a condition to a claimant is determined from the perspective of the administrator, on the basis of formal criteria, rather than from the perspective of the claimant. Such objectivity is essential if the conditions are to have any significance. Were "suitability" determined from the claimant's viewpoint, for example, any work which he could have taken but did not would have been rejected by him for its "unsuitability." "Objectivity" and "subjectivity" of definition are not distinct alternatives, however; varying degrees of objectivity are possible. Thus one of the normal criteria of suitability is "moral" suitability. "Moral" can be taken as an absolute characteristic of the work itself or as a function of the relationship between the circumstances of the claimant (including, perhaps, his religious convictions) and the nature of the work. *Compare* Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962), *rev'd*, 83 Sup. Ct. 1790 (1963) (as an infringement of freedom of religion), holding that a refusal to work on Saturday, for religious reasons, rendered a claimant ineligible because "risk to morals" applies only to the work itself, *with* Tary v. Board of Review, 161 Ohio St. 251, 119 N.E.2d 56 (1954).

It should be noted here that one of the results of defining "suitable" objectively is to make possible the accomplishment by indirection of some results which could not be accomplished directly through conditions of eligibility. It would obviously be impermissible for a state to condition eligibility upon a claimant not being a Seventh Day Adventist. Yet, as the Michigan Supreme Court pointed out, to define the suitability of work so objectively as to require availability for Saturday work accomplishes the same end, in effect. Swenson v. Employment Security Comm'n, 340 Mich. 430, 437, 65 N.W.2d 709, 712 (1954). Similarly, if the federal standards prevented the states from imposing acceptance of training as a condition of eligibility, a claimant might nonetheless find himself required to accept training which an employer whose employment was deemed "suitable" offered him. If execution of a loyalty oath as a condition of eligibility could not be required, a claimant might nonetheless find himself required to execute such an oath by

uniformly applied in administrative processes. Thus the requirement that a claimant be "available" for "suitable work" and that he not refuse such work subjects the claimant to the judgment of administrators as to what work is "suitable" for him and how he must behave to be considered "available," inhibiting the independence and autonomy with which he may choose his vocation and order his affairs.[84] The requirement is analogous to the conditions charitable benefactors place upon their bounty—conditions which the social insurance principle of payments as a matter of right was supposed to eliminate. Yet at the same time, the federal standard encourages if not requires states to adopt benefit provisions serving to define the concept of "unemployment." If the states are to be required to implement the principle of payments as a matter of right, and at the same time allowed to limit the coverage of that principle by imposing conditions precedent to eligibility, a test must be developed to distinguish between those conditions precedent to eligibility whose adverse impact on the principle of payments as a matter of right is permissible and those whose adverse impact on the principle is not permissible.

In developing an analytic tool for determining the conformity of benefit provisions, then, a crucial distinction must be made between two kinds of condition precedent to eligibility. Some conditions serve to delimit the risk of "unemployment"—most of the common eligibility conditions and disqualifications are of this kind. Others impose social norms upon claimants without so delimiting the risk. Risk-delimiting conditions are almost as basic to unemployment compensation as is its ethical import: they have the impregnable virtues of venerability, necessity, and statutory sanction to secure them against so much as a suggestion of inconsistency with the federal standards. The states *must* delimit the risk to be covered by their laws so that only "unemployment" is included. Such conditions precedent to eligibility as serve that end are not only permitted but, to some degree, affirmatively required by the act.[85]

But what of conditions which do not serve to delimit the risk of "unemployment"? In the light of the congressional intent to promote the principle of payments as a matter of right, the federal requirement of payments exclusively "with respect to their unemployment" must be taken to preclude the require-

his prospective employer. *But see* Syrek v. California Unemployment Ins. Appeals Bd., 54 Cal. 2d 519, 7 Cal. Rept. 97, 354 P.2d 625 (1960) (conscientious refusal to execute a loyalty oath required for a civil service position does not render a claimant unavailable); *Jobless Pay Awarded Man Fired for Evading Question on Red Links*, Wall St. Journal, Sept. 9, 1963, p. 11, col. 2.

84. Similarly, the disqualification for unemployment due to involvement in a labor dispute, while designed to preserve the "neutrality" of the state in labor disputes, also inhibits the freedom of bargaining of employees. The disqualification for voluntary quitting inhibits the freedom of occupational choice of employees and diminishes their individual bargaining power vis-à-vis their employers. Perhaps the most intrusive conditions are those which impinge upon a worker's freedom of personal relations—disqualifications for unemployment due to pregnancy or other marital obligations.

85. See text accompanying notes 58-62 *supra*.

ment of more than "unemployment"—however defined by risk-delimiting conditions—as a condition precedent to eligibility. Thus, in order to justify the adverse impact of such a condition, it must always be shown that the condition serves a risk-delimiting function. To the extent that claimants in a state who fall within the scope of "unemployment" are denied benefits on some other ground, those who do receive benefits in that state are being compensated for something more than their "unemployment." For this reason, denial of benefits cannot be used to enforce extraneous desirable objectives, in the manner of a penalty.[86] Imposition upon claimants of demands not made of other members of society and unrelated to risk delimitation is inconsistent with the federal standards. If social goals extrinsic to unemployment compensation are deemed desirable, they must be pursued independently.

The relevance of the above analysis becomes clear in considering the conformity of two conditions precedent to eligibility for benefits: the proposal that a claimant be required to perform public work without remuneration while receiving his benefits, and the Ohio requirement that a claimant execute a loyalty oath. The public work condition would be an obvious affront to the principle of payments as a matter of right, since it would bluntly inform the claimant that whatever he might have thought about having accrued his benefit rights over the years, he is still expected to "earn" his benefits. No matter how a state might word the condition, seeking to preserve a fiction that benefits were being paid for "unemployment" with the merely incidental condition that unremunerated work be performed, it would be perfectly clear to the claimant that rather than receiving social insurance he was actually being paid substandard wages for the performance of public work. No redeeming feature in terms of risk delimitation appears. Indeed, the condition conflicts patently with the requirement that payments be made with respect to "unemployment." This condition clearly does not conform to that federal standard.

The rational relation of a loyalty oath [87] as a condition precedent to eligibility for unemployment compensation to *any* legitimate end of government

86. "Penalty" is used in this Note to mean the withholding of (or taking away) that to which the penalized individual would, in the absence of the circumstances giving rise to the withholding, be considered to have a "right" (or would be expected to consider himself as having a "right"). Thus withholding of that which is legally a "gratuity" may nonetheless be a "penalty." See text accompanying notes 97-102 *infra,* and see note 100 *infra.*

87. OHIO REV. CODE § 4141.28 (Supp. 1962) provides that:

> Every person filing an application for determination of benefit rights . . . shall attach to such application his written affidavit stating whether he advocates or does not advocate and whether he is or is not a member of a party which advocates, the overthrow of our government by force. In the absence of such affidavit no application shall be valid.

Since an affidavit admitting advocacy or membership would result in a denial of benefits, OHIO REV. CODE § 4141.29(D)(2)(d) (Supp. 1962), the effect of this provision is to make an affidavit of non-advocacy and non-membership (as well as the fact of non-advocacy and non-membership) a condition precedent to eligibility. A prior version of this provision was upheld against a variety of constitutional attacks in Dworken v. Col-

may well be questioned. The condition seems to represent pure vindictiveness —a state of mind peculiarly inappropriate in the social insurance setting. Since the condition obviously does not conform to the federal standard requiring payments with respect to unemployment, its constitutionality need not be considered.[88] It is based upon a conception of unemployment compensation as a system of charitable beneficences which may be conditioned upon possession of whatever moral qualities the legislature of a state holds dear.[89] No legitimating role of risk delimitation is present. In fact, it would be hard to imagine a condition more wholly extrinsic to the needs and purposes of unemployment compensation.[90]

lopy, 56 Ohio L. Abs. 513, 91 N.E.2d 564 (C.P., Franklin Co., 1950). Defendant's motion to dismiss an appeal was overruled, 67 Ohio L. Abs. 68, 118 N.E.2d 857 (Ct. App., Franklin Co., 1951). Official reports reveal no further history of the case; a letter to the author from the son of the plaintiff (now deceased), indicates that the appeal was taken, being Case No. 4474 in the Court of Appeals of Franklin County, with an opinion affirming the decision of the lower court rendered on June 12, 1954. Letter From Morton R. Dworken, May 8, 1963. Since Dworken v. Collopy, *supra*, was a taxpayer's suit for an injunction to restrain the Employment Security Administrator from enforcing the statutory requirement of an affidavit, no denial of benefits was involved. The only case in which benefits have been denied under the Ohio requirement was *In re claim of* Wallace Bednarczyk, Board of Review Appeals Docket No. 227785, April 2, 1958 (application to institute further appeal denied, June 3, 1958). A letter to the author dated April 24, 1963 from the Director of the Unemployment Compensation Division of the Ohio Bureau of Unemployment Compensation states that there have been no subsequent cases. "The effect of the provision today, therefore, is principally administrative in nature, requiring the administration of the oath to all applicants." Letter cited note 3 *supra*.

The Ohio provision has some precedent in the Emergency Relief Appropriation Act, § 15(1), 54 Stat. 620 (1940), providing that "no alien, no Communist, and no member of any Nazi Bund Organization" was eligible for W.P.A. employment, and that a noncommunist affidavit was a prerequisite to eligibility for payments under the act. See Annot., *Validity of Governmental Requirement of Oath of Allegiance or Loyalty*, 18 A.L.R.2d 268, 343-45 (1951).

88. See note 74 *supra*, concerning decertification for unconstitutionality.

89. *Cf.* Dworken v. Collopy, 56 Ohio L. Abs. 513, 524, 91 N.E.2d 564, 572 (C.P., Franklin Co., 1950) (upholding the constitutionality of the Ohio loyalty oath requirement):

> In the last analysis, unemployment compensation is a gratuity furnished by the state, from a fund paid in by the employers and to which the worker makes no contributions and the privilege to participate therein has been made conditioned (*sic*) upon the recipient not being engaged in efforts to destroy the very source from which he seeks that gratuity.
>
> If he is so engaged, why should society by financing him in idleness, assist him in his efforts to wrong that same society? Or why, if he is not so engaged, should he hesitate so to assert? If he wishes to enjoy the benefits which a generous government provides, he should be willing to comply with a very simple condition.

90. However, "No one can recall that the Department of Labor raised any question about certifying our Law after this [loyalty affidavit] amendment was enacted." Letter cited note 3 *supra*, from the Ohio administrator. The Federal Security Agency, which administered the Social Security Act at the time, did consider the issue, but concluded, apparently for political reasons, not to raise any questions. See note 83 *supra* for discussion of the possibility that an oath might be required in effect by objective definition of "suitability."

When the absence of any risk-delimiting function—any contribution to the definition of "unemployment"—is as clear as in the public work and loyalty oath conditions precedent to eligibility, and the conflict with the principle of payments as a matter of right as blatant, it is not hard to arrive at the conclusion that such a condition does not conform to the federal requirement of payments with respect to "unemployment." In the case of the much more important vocational training and basic education conditions, however, neither the absence of a risk-delimiting function nor the inconsistency with the principle of payments as a matter of right is as obvious, and a more careful consideration of the problem of conformity is necessary.

Vocational retraining as one avenue of attack upon the problem of unemployment has recently become very popular. Its proponents consider it a particularly apt response to a simultaneous occurrence of technological unemployment and of labor shortages in certain trades. Before the recent advent of a major federal investment in retraining,[91] it was natural that those who favored such a program for the unemployed would seek to finance it, in part, by inclusion within an existing program. Unemployment compensation was the obvious candidate. The inclusion was accomplished by allowing trainees to receive unemployment compensation despite their non-"availability" while in training. On first impression, payments to trainees would seem not to be payments with respect to unemployment; such payments seem more like scholarships to a student than unemployment compensation to a member of the labor force.[92] However, the conformity of payments to trainees was defended on the basis of the connection between training and employability. Vocational training, defined as education designed to improve a trainee's immediate employment prospects, can be considered not as precluding availability, but as developing *effective* availability.[93] By undertaking training, the claimant manifests both the involuntariness of his unemployment and his attachment to the labor market: such action would hardly seem to end his membership in the class of unemployed workers which unemployment compensation was designed to cover. On these grounds, it was felt proper that claimants be encouraged to undertake training by allowing them to remain eligible for benefits while in training.

Once this step was taken, it was easy to proceed further to the conclusion that claimants should not be allowed to refuse training while continuing to receive benefits. Although the technologically unemployed worker is clearly within the risk covered by unemployment compensation at the inception of his

91. See Area Redevelopment Act, 75 Stat. 47 (1961), 15 U.S.C. § 696, 40 U.S.C. § 461, 42 U.S.C. §§ 1464, 2501-25 (Supps. IV, III, 1963); Manpower Development and Training Act, 76 Stat. 23 (1962), 42 U.S.C. §§ 2571-77 (Supp. IV, 1963) [hereinafter cited as MDTA]; Trade Expansion Act, 76 Stat. 872 (1962), relevant provisions at 19 U.S.C. §§ 1931-78 (Supp. IV, 1963).

92. See note 67 *supra.*

93. Letter From Secretary of Labor to the Governor of each state which did not allow payment of benefits to trainees, Nov. 21, 1961. See also Bureau of Employment Security, U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 631, Nov. 13, 1963.

unemployment, his refusal to accept training can be seen, on the basis of the rationale for allowing benefits to trainees, as manifesting lack of continuing attachment to the labor market by an unwillingness to take those steps necessary to create effective "availability." Viewed solely in terms of attachment to the labor market, the progression seems reasonable enough. But this view fails to take account of the ethical import of unemployment compensation. This import includes as a major element the maintenance of the independence and autonomy of the individual—in particular, here, the maintenance of his sense of self-direction. This critical element, which intervenes between the step in which training is allowed and the step in which it is required, cannot be disregarded. To the extent that covered workers know of it, the condition currently in force in three states,[94] that claimants accept retraining to which they are referred, undermines their prospective sense of right while they are still employed. In any case, it does so when actually enforced upon them. It likewise casts a shadow upon a worker's sense of security: he cannot know in advance whether *he* will be singled out to be referred for retraining, for *what* he will be required to be retrained, or whether his new skill will result in a new job.[95] This insecurity may have a substantial impact on him, since he may well have good reason—reason sufficient to him—not to want any re-

94. *District of Columbia*:

> If any individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, to attend a training or retraining course when recommended by the manager of the employment office or by the Board and such course is available at public expense, he shall not be eligible for benefits with respect to any week in which such failure occurred.

D.C. CODE tit. 46, § 46-310(e) (Supp. II, 1963).

Michigan:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:
>
> (e) He has, when directed by the commission attended a vocational retraining program. . . .

MICH. STAT. ANN. ch. 154(b), § 17,530(e) (1960).

Missouri:

> . . . where potential eligibility [for benefits during a period of training] is determined, the director shall require the claimant to take a retraining course of instruction to be eligible for benefit payments.

VERNON'S ANN. MO. STAT. § 288.055(2) (Supp. 1962). The determination of "potential eligibility" must be made in accordance with statutorily defined criteria. See note 105 *infra*.

See note 3 *supra*, for the status of the condition in other states. Michigan (Letter From Norman Barcus, Director, Research and Statistics Division, Michigan Employment Security Commission, May 1, 1963) and Missouri (Letter From LeRoy Schantz, Director, Division of Employment Security, Missouri Department of Labor and Industrial Relations, May 7, 1963), have apparently not actually applied the condition. The District of Columbia (Letter From Edgar L. Lickey, Director, District of Columbia Unemployment Compensation Board, Sept. 5, 1962) has applied its condition to at least three individuals.

95. It is, of course, frequently difficult for an administrator to predict what the demands of the labor market will be six months or a year hence.

training;[96] if the insecurity should become actualized, and he is forced to choose between his opposition to retraining and his need for compensation, he finds himself precisely in the position of a recipient of charity—he receives benefits only at the price of playing his benefactor's tune.

Even in the absence of the special ethical import of unemployment compensation, American governments have traditionally respected the right of citizens to determine the course of their personal lives. For example, concern was expressed during the hearings on the Manpower Development and Training Act [MDTA] [97] lest any federal legislation should go beyond trying to "induce" workers to move to new communities where work would be available for them.[98] Even were government omniscient, there is something peculiarly personal about the choice of a home; the importance to the individual of autonomous choice of occupation, and the great value to society in leaving that choice to the individual affected by it, is much the same.[99] Unlike unemployment compensation, MDTA is not social insurance, and is not designed to foster any sense of "right" to the training allowances it provides. Thus, although it requires administrative determination of the vocation for which the applicant will be trained, and although it requires a trainee whose prospective skill is in demand only in another labor market to guarantee in advance of training his willingness to move, these requirements are implemented only

96. Since retraining benefits are low and the work for which the formerly skilled can be retrained is often of lower status than their earlier jobs, "both training and new job often represent drops down the economic and status ladder," which the unemployed worker is understandably unwilling to accept. Bernstein, Tackling the Problem of Plenty: A Proposal for Making Automation Make Jobs, August 1, 1963 (unpublished manuscript on file with its author, a lecturer at the Yale Law School). In addition to economic, personal and psychological factors, racial discrimination in training programs may be cause for some claimants not to want retraining. See Letter From Fay Bennett, Executive Secretary, National Sharecroppers Fund to the Editor of the New York Times, N.Y. Times, May 8, 1963, p. 38, col. 8; *Job Programs Tied to Discrimination*, N.Y. Times, April 25, 1963, p. 21, col. 8.

97. Act cited at note 91 *supra*.

98. *Hearings Before the Subcommittee on Unemployment and the Impact of Automation of the House Committee on Education and Labor*, 87th Cong., 1st Sess. 157-62 (1962).

99. The resolution's phrase "any unemployment compensation claimant refusing such instruction [*i.e.* retraining] to be disqualified for benefits" has distressing implications. The use of a social insurance benefit as a club to enforce a system of labor direction is a severe modification of the American tradition of occupational choice. NINTH BIENNIAL REPORT OF THE [CONNECTICUT] LEGISLATIVE COUNCIL, Dec. 5, 1960, reporting a negative recommendation to the Connecticut General Assembly on a proposal to enact a retraining condition. See note 3 *supra*. State availability rules have traditionally been sensitive to the desire of a claimant to restrict himself to his usual trade or former employer—at least for the first few weeks of unemployment—if the restriction is at all reasonable. See BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE § 8.11 (1962); ALTMAN, *op. cit. supra* note 65, at 111-14. The Trade Expansion Act, § 326(b) (see note 91 *supra*), provides that priority for federal assistance shall go to retraining projects which will return an employee to his old firm, thereby witnessing to congressional concern for the importance of stability in a worker's life.

through "inducements,"[100] albeit powerful ones.[101] But in the context of unemployment compensation, administrative determination of the training which must be accepted as a condition of receiving benefits creates more than a strong inducement: it poses a threat of withholding that to which the claimant reasonably feels himself entitled. Hence, while a condition of eligibility under MDTA—from this perspective[102] a sophisticated form of charity—is an inducement, a substantially similar condition in the social insurance context of unemployment compensation is coercive: it promotes a desirable goal by the imposition of a penalty.

But while the retraining condition conflicts with the social insurance principle, if it has a risk-delimiting function it can nonetheless be justified as a permissible condition precedent to eligibility. To the extent that employability substantially depends upon skills not possessed by a claimant, the refusal by him of training in one of those skills is very like a refusal to make himself available for work which actually exists. Or, phrased another way, the coverage of unemployment compensation is said to be limited to those genuinely attached to the labor market; it is not sufficient that the original loss of his job was a covered risk if the claimant does not continuously manifest his attachment. How attached, it might be asked, is one for whose sole skill there is no demand and who refuses to learn a skill for which there is demand? Is he "unemployed," or is he making himself unavailable? Just as an "active search for work" is generally required as evidence of availability,[103] so an active attempt to make oneself employable might reasonably be required—both rest on the theory that availability imposes a continuing obligation to manifest an attachment to the labor force. Similarly, just as a refusal of an offer of suitable work entails disqualification because it evidences that the claimant's unemployment is not wholly involuntary, so might a refusal of suitable training. The coercion involved in assigning a claimant to training is little different from that intrinsic to all risk delimitation. The retraining condition does not seem much out of harmony with existing risk-delimiting conditions. Thus the condition is justifiable as a legitimate risk-delimiting test, contributing to the definition of "unemployment," notwithstanding its adverse impact on the ethical import of unemployment compensation.[104]

100. By "inducement" is meant an offer of some benefit, to which the prospective beneficiary cannot reasonably consider himself entitled as of right, to persuade him to undertake a desired course of action; by "coercion" is meant a threat to withdraw or withhold something, to which the threatened person does reasonably conceive himself entitled as of right, for the same object. While the distinction may be wanting analytically, it is a very real one psychologically. See note 86 *supra* for a definition of "penalty" in similar terms. "Coercion" is, in effect, the threat of a "penalty."

101. There are a number of advantages to an unemployed worker of MDTA allowances over unemployment compensation. For one thing, MDTA allowances can be obtained after he has exhausted his benefit rights. MDTA § 203.

102. Seen as a whole, rather than from the social insurance perspective, MDTA is an example of congressional concern primarily with economic needs. See text accompanying notes 35-37 *supra*.

103. BES COMPARISON 87-88.

104. Even if the above argument concluded differently—that the retraining condition is probably not in conformity with the federal standards—decertification of a state's law

If the retraining condition does not itself pose a conformity problem, its implementation may. Of the various possible ways of implementing the condition, some may aggravate its adverse impact on the ethical import of unemployment compensation without any compensating effect of refining its risk-delimiting function. To the extent that such an implementation is not essential to the primary risk delimitation it serves, in this case to the retraining condition, it must be considered non-conforming: it does not add to the definition of "unemployment." For example, a statutory or administrative failure to provide for some consideration of a trainee's wishes in determining the skill for which he is to be retrained aggravates the adverse impact of the retraining condition without adding to its effectiveness as a risk delimitation. Yet none of the three states which have enacted the condition provide by statute for consideration of the trainee's wishes.[105] The rationale by which the retraining condition was justified is as fully satisfied by a condition which says to the claimant, "You must accept retraining, but your desires will be given substantial weight in determining the skill for which you are required to accept training," as by a condition which says, "You must accept retraining for whatever skill the employment office determines." Implementation in the manner of the latter statement adds an unnecessary affront to the principle of payments as a matter of right. It undermines the antonomy, dignity and independence of the claimant. At the same time, it adds nothing apparent to the delimitation of risk which justifies the retraining condition. The conclusion of this analysis is that the retraining condition cannot itself meet the requirement of payments with respect to "unemployment," unless in its implementation the desires of the claimant are given substantial weight. In general terms, conditions precedent to eligibility are justifiable as definitions of "unemployment" only if their adverse impact on the ethical import of unemployment is limited to that which is in fact necessary to accomplish their risk-delimiting function.

Another apparent defect in the retraining condition of two of the three states imposing it is a failure to require that, before the condition is imposed on a claimant, findings be made that he has no prospect of employment in his current skill, that there is such prospect in the proposed skill, and that he is trainable.[106] All of these circumstances were assumed in concluding that the

including the condition would be precluded by the political limitation (see text accompanying notes 77-80 *supra*) on the Secretary of Labor's power to interpret the federal standards posed by the fact that Congress has enacted the condition for the District of Columbia. See note 94 *supra*.

105. See statutes set forth at note 94 *supra*. Both Michigan (Letter From Harold N. Rosemont, Director, Unemployment Compensation Division, Michigan Employment Security Commission, Sept. 27, 1962) and Missouri (Letter From LeRoy Schantz, Director, Division of Employment Security, Missouri Department of Labor and Industrial Relations, May 7, 1963) indicate that a claimant's interests would in fact be considered in assigning him to training.

106. The exception—the Missouri condition (see note 94 *supra*)—permits imposition of the condition only when "potential eligibility for benefits [while in retraining]" is determined. The statute makes the following requirements for such determination:

> 3. A determination of potential eligibility for benefits under this section and chapter, shall be issued to an unemployed claimant of the director finds that:
>
> (1) Reasonable employment opportunities for which the unemployed claimant is fitted by training and experience do not exist or have substantially diminished

condition serves a risk-delimiting function.[107] Indeed, much of the assumption is implicit in the definition of "vocational training" adopted in this Note: training specifically designed to make an individual employable for an available job. A state which imposed the condition without making such findings would not be able to justify it as adding to the definition of "unemployment." Thus a condition so imposed is in non-conformity with the federal standard that payments be made with respect to "unemployment."

While its non-conformity seems clear if the retraining condition is imposed without considering the claimant's desires or without making findings of his present unemployability, the demand for the prospective skill, and his aptitude for training, it is a far more difficult question whether statutory provision for the requisite consideration and findings is necessary to preserve conformity, or whether administrative practice would suffice. Because the District of Columbia's statute makes explicit provision for neither,[108] however, the question must be resolved in favor of the sufficiency of administrative practice alone. Congressional action in enacting the District's condition[109] imposes a political limitation upon the Secretary of Labor's power to interpret the requirement of payments with respect to "unemployment." However, appropriate administrative practice is a minimum prerequisite of conformity with the federal standards, and there is no similar political limitation upon the Secretary's power so to interpret the standard.[110]

While related to the risk-delimiting function of the retraining condition and therefore within the ambit of conformity, a requirement that a claimant accept retraining for a skill which involves moving to a new community is undesir-

---

in the labor market area in this state in which he is claiming benefits;

(2) The retraining course of instruction relates to an occupation or skill for which there are, or are expected to be in the immediate future, reasonable employment opportunities in any labor market area in this state in which the claimant agrees to seek work;

(3) The retraining course of instruction is one prescribed by the director;

(4) The individual has the required qualifications and aptitudes to complete the course successfully and profit therefrom; and

(5) Upon completion of his retraining course of instruction the individual should be qualified to use the skills acquired under labor organization rules where applicable to such skills.

VERNON'S ANN. MO. STAT. § 288.055(3) (Supp. 1962). Michigan apparently requires such findings as a matter of administrative practice. See Letter From Harold N. Rosemont, Director, Unemployment Compensation Division, Michigan Employment Security Commission, Sept. 27, 1962.

107. See text accompanying notes 103-04 *supra*. See also Bureau of Employment Security, U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 631, Nov. 31, 1961.

108. See note 94 *supra*.

109. It should not be assumed, however, that Congress gave any serious thought to the condition it enacted, let alone to the consistency to the purposes and requirements of the Social Security Act of various modes of implementing it. See, for the entire legislative history of the District's condition, 108 CONG. REC. 4652-53 [Conference Report approved in Senate, 4766-68 [Conference Report, H.R. REP. No. 1474, 87th Cong., 2d Sess. (1962), approved in House and set out—contains a mere description of the condition] (1962).

110. See text accompanying notes 75-77 *supra*.

able. It adds to the burden of a claimant who has already suffered a loss of autonomy by being required to accept retraining. Such implementation of the retraining condition could arise, for example, if a state were to deny benefits to a claimant on the basis of his refusal to accept MDTA retraining which would require him to move to a different labor market. The sense of right to live where one chooses is very strong, and any condition which necessitates a choice between this right and eligibility for benefits inevitably undermines the sense of right to unemployment compensation. It has always been a basic policy of state unemployment compensation laws that a claimant should not be required to move to render himself available for work, even if unemployment is localized in his community.[111] There seems to be every reason to extend this policy to include implementation of the retraining condition. It is not apparent that countervailing considerations outweigh the value of the safeguard.[112]

Similarly, a period of several weeks of benefits should be allowed every claimant before he is required to accept retraining. Even when the staff of the state agency knows that the claimant will not succeed in finding a job on his own,[113] it is a basic prerequisite of the claimant's sense of self-reliance and dignity that he have the opportunity to try. It is equally important, from the social insurance perspective, that he perceive this opportunity as a right. As with the problem of coerced moving, there are already procedures under state laws with which the safeguard suggested here is in harmony. The definition of "suitable" work, for which a claimant must be available and which he cannot refuse, is a flexible one. At the outset of his unemployment it fairly narrowly circumscribes his previous vocation; but its content increases as he remains unemployed.[114] The states thus express a policy of deference towards the autonomous activity of the individual, by allowing him greater freedom

111. ALTMAN, *op. cit. supra* note 65, at 199.

112. Of the three states with the retraining condition, only the District of Columbia provides that a claimant may refuse retraining for "good cause"; presumably Michigan and Missouri would also allow such an exemption. The proposed safeguard could be easily implemented by interpreting "good cause" as including a desire not to move.

113. Note that this argument assumes the benevolent omniscience of the administrator. Without either benevolence or omniscience—or both—the argument is of course vastly strengthened. See note 96 *supra*, for an example of one form of non-benevolence: racial discrimination. One state administrator writes as follows:

> I am not at all sure that the Connecticut General Assembly, or anyone else, agrees with my distaste for utilizing the award or withholding of benefit rights under an insurance scheme to enforce a system of labor direction, and a denial of freedom of occupational choice. I suspect that I am a voice crying in the wilderness on this one. . . . My reluctance does not stem from . . . any lack of faith in my superior wisdom to determine what occupations *other people* ought to adopt. . . . [But] twenty-seven years in a bureaucracy has given me no indication that bureaucrats are prepared to "play God" in this area or any other, and if my reluctance to assume the mantle of divinity appears old-fashioned, I think it is, nevertheless, sound.

Letter From Joseph J. Gibbons, Executive Director, Employment Security Division, Connecticut Labor Department, May 23, 1963.

114. ALTMAN, *op. cit. supra* note 65, at 89, 163.

at the inception of his unemployment than the strictest limitation of risk would demand. It does not seem that a grace period before the retraining condition is imposed would any more impede its risk-delimiting function than the flexible definition of "suitable" does in the case of the "availability" and "refusal of suitable work" tests.

Conscientious administrators would probably implement each of these suggested examples of safeguards. However, without explicit formulation there is no guarantee, no known right, to the protection expressed in the safeguard; the desired beneficial effect on the sense of right to unemployment compensation will be unnecessarily lessened. And, of course, without explicit formulation the safeguards will probably not be implemented in every case. They should, therefore, be officially announced in some way—whether by statute, or by published administrative regulations—and made known to everyone covered by unemployment compensation.

In the light of the above treatment of the retraining condition, little further need be said concerning the conformity of the requirement that poorly educated claimants undertake basic education. It resembles the retraining condition in its adverse impact on the ethical import of unemployment compensation; indeed, if anything its impact is more severe, since officially treating an adult as a child to be sent to school is an obvious affront to the sense of dignity which a social insurance program is supposed to foster. But because basic education is distinguished from vocational training by its lack of direct relation to the trainee's immediate employment prospects,[115] it does not have the redeeming function of risk delimitation which the retraining condition has been shown to have. It therefore does not serve, in any substantial way, to define "unemployment" and does not conform to the requirement of payments with respect to "unemployment."

The tools for analysis of a given condition precedent to eligibility in a state's law can be put in terms of a series of inquiries:

1. Whether the condition conflicts with, or adversely affects the impact of, the ethical import of unemployment compensation.

2. If it does, whether it is nonetheless closely related to a legitimate risk-delimiting element of an unemployment compensation law (*e.g.*, to the availability for work test), or otherwise serves to define the scope of "unemployment," so that its adverse impact may be justified.

3. If the condition itself serves to delimit the risk of "unemployment," whether its implementation is such that the adverse impact of the condition does not extend beyond what is essential to its risk-delimiting function.

4. Given the conformity of a condition, whether reasonable safeguards have been provided to minimize its adverse impact on the ethical import of unemployment compensation.

115. It is of course true, as noted in note 1 *supra*, that a person's general educational level has a great impact upon his employability and his trainability. But any education to cure such a deficiency, which could be required as a condition of eligibility for benefits, would have to be effective in increasing employability within the short period (Maximum, 39 weeks, in Oklahoma—most frequently, 26 weeks. BES COMPARISON 75-76.) of compensated unemployment, and would have to be directly—not generally—related to the claimant's availability for work.